TO: Chief Executives & General Counsels

FROM: Horace R. Kornegay

July 8, 1971

Report of Preliminary Discussions With Federal Trade Commission Officials

On Thursday afternoon, July 8, Messrs. Kornegay, Mills, and Austern met at the Federal Trade Commission with Chairman Miles Kirkpatrick, Robert Pitofsky, Director of the Bureau of Consumer Protection, Harold Rhynedance, Assistant General Counsel, and Caswell O. Hobbs, Assistant to Chairman Kirkpatrick.

Mr. Kornegay stated that the industry representatives were there for a preliminary discussion, and were authorized by the six proposed respondents to explore a number of questions and hopefully to consider some scheduling.

Mr. Kornegay expressed the view that there was no basic disagreement on the objective of an order that would result in the Congressional warning being disclosed in cigarette advertising. He further stated that it was believed desirable to discuss a consent order, rather than to have prolonged litigation that would tax the Commission's resources as well as those of the industry.

He noted that while the Institute was not a party, it believed that it expressed the attitude of the various company managements that, in view of the agreement on objectives, no one would welcome a long period of arduous litigation raising every available legal issue.

Mr. Kornegay then reviewed the fact that in keeping with the Congressional suggestions of self-regulation, five of the companies had attempted to meet the problem of disclosing the Congressional warning. Presented to the Commission representatives were several advertisements which it was urged did meet any concept of clear and conspicuous disclosure in the package depiction they contained. On this basis Mr. Kornegay stated that we believed it would be feasible to formulate a complaint based on unfair methods of competition, and that this would be preferable as a way to achieve the common objectives, rather than putting the industry in a position where it would have to, as it believed it could, controvert many of the allegations of the complaint.

At Mr. Kornegay's invitation, Mr. Austern outlined the basic legal concepts. He noted that the allegations of

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the complaint, some of which were reviewed in general, put the industry in an impossible position both publicly and in terms of private litigation. Among the points discussed in that area were the fact that the complaint in seven paragraphs flatly was based on the proposition that "cigarette smoking is dangerous to health," whereas the Congressional declaration was that "cigarette smoking may be hazardous to health."

It was urged that, in the industry view, the issue of smoking and health was still controversial, and that while research was being done, and absent a scientific breakthrough, the industry was not unwilling to go along with the present FTC desire to have the Congressional warning included in advertising. Indeed, this could be the act of the Commission.

It was stated that there could be a basis for discussion of a consent order if three points could be at least preliminarily indicated as being open.

The first was a redrafted complaint based on unfair methods of competition which would not put the industry in the invidious public position which the present complaint would, particularly in view of its efforts at self-regulation.

The second point was that in view of the pending private litigations the industry lawyers in charge of such litigation were apprehensive about the form of the denial of any admission. It was stated that this boilerplate would have to be amplified. Chairman Kirkpatrick expressed considerable doubt as to this need. His position seemed to be that the fact that a poor judge might let the complaint go to the jury could hardly be a fact on which the Federal Trade Commission could act. Despite this, there was a general feeling that this point could be adequately dealt with. In short, there seemed to be no major insistence that the boilerplate disclaimer would be rigid. The Chairman expressed the desire to have some type of memorandum or briefing on the need for amplifying the disclaimer. He also indicated a desire to have the problems with the present complaint set forth in writing.

The third point made was that the industry did not understand the added paragraph to the order suggesting that what is "clear and conspicuous" would be worked out on a record. After considerable technical legal discussion, it was suggested that this really had relation to what would occur if the cases were litigated, and there was general agreement that if a consent settlement should be reached, there would have to be a rather full understanding as to what that phrase, "clear and conspicuous," would mean for the

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future. It was further suggested that in view of the size of the industry, it might not be feasible to attempt to freeze its advertising into just a few prototype formats.

When asked directly whether the package depiction, as illustrated in one of the best ads which could be presented, would be satisfactory in terms of "clear and conspicuous," Pitofsky stated that he did not think so, and that he "believed" that was the Commission's view. When pressed by Mr. Kornegay as to what he did have in mind, he initially talked about "balancing the warning statement with the full advertisement," then retreated from that position, but made it plain that in his view and presumably that of the Staff, any warning statement presented merely on a corner of the ad, in a package depiction in a format now being employed, would not comply.

The industry representatives replied that some type of understanding or guidelines would have to be worked out before any consent agreement could be achieved, and it was left that every effort would be made to reach a reasonable solution. Moreover, if what the industry were willing to present did not satisfy the Staff, it would be feasible to take it directly to the Commission.

As to scheduling, it was left that within the near future, the form of a complaint based on unfair methods of competition would be forwarded for study by the Staff, and that the type of desired disclaimer would also be drafted and presented.

As to timing, Mr. Pitofsky expressed the wish that these be presented to him by around August 1.

The industry representatives pointed out that there were six companies involved, each with both general and litigating counsel, and that the resolution of the many issues would be time consuming. At one or two stages of the discussion, it was firmly made clear that if litigation did have to occur, it would be fully and vigorously carried on by the industry.

In conclusion, Mr. Kornegay stated that if consent negotiations were feasible, and the three key points urged could be resolved, the industry wanted to move as diligently as possible. It was also suggested that no one would like to see a consent settlement followed thereafter by a series of compliance proceedings or controversies. Instead, the industry wanted a package deal. There was general agreement that further discussions ought to be pursued and that these could be undertaken promptly after the first of August and prior to August 15.

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